No. 3105

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., SECURITY INSURANCE COMPANY OF NEW HAVEN,

*Appellants,*

vs.

DAVID ISAACS,

*Appellee.*

## APPELLEE'S PETITION FOR A REHEARING.

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*To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

The general credence ordinarily and properly given to the decisions of this court and the especial respect and high regard with which counsel for your petitioner has always viewed and been guided by those decisions, combine to make counsel

rather diffident in petitioning this court for a rehearing by it of this case. This diffidence arises in part from the fact that it has been counsel's observation that its opinions result from such thorough examination of the record and points involved that a rehearing only serves to reconvince the court of the propriety and correctness of its original decision.

Due consideration of these matters and of the vast amount of litigation now pending before this court, force counsel further to hesitate in bringing here a matter which this court has already considered and as to which it has stated its views.

However, this one proposition is patent: the very existence of such a remedy as "petition for rehearing", the necessity and advisability of which have been recognized by this court, presupposes the possibility of error, and affords the opportunity for this court to make the necessary correction where same is deemed consistent with the law and the equities of the case.

Furthermore, counsel suggests this justification for thus imposing on this court's time and patience: that at the original hearing of the case before this court, counsel inadvertently omitted to set forth certain matters which, by reason of the peculiar nature of this case not lending itself readily to an accurately true presentation by written record alone, were, we believe, not considered by this court in its decision, and which we further believe this court

would be inclined to entertain, on rehearing, favorably to the appellee, your petitioner.

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### COMPLAINANTS' KNOWLEDGE, LACHES, BAD FAITH, AND ACQUIESCENCE.

At the very outset counsel desire to call to the court's attention a matter which we deem in itself more than sufficient to preclude these complainants from claiming in a court of equity that this bulk sale was fraudulent or void.

It is to be noted that this action was not commenced until the year 1916, whereas the bulk sale was concluded September 29, 1913; and, furthermore, that there was no complaint, in fact no mention even, of the bulk sale in the original bill of complaint filed, nor in the amended bill of complaint, and it was not until January 31st, 1917, (*during the trial*) when by an amendment to their amended bill of complaint these complainants set up their knowledge of the bulk sale and claimed it to be fraudulent and void. It is to be noted that the verification of this amendment, as also the verification of the bill of complaint, is made and signed by Jesse Olney, counsel for complainants, wherein the reason for this action is stated in these words: "* * * that the allegations of said amendment to the first amended bill of complaint are more within *my own knowledge* than of the officers of the said corporations complainant." Signed "Jesse Olney" (Trans. p. 27). (All italics in this petition, ours.)

It follows from these facts, therefore, that in ascertaining whether there was laches or good faith it is very material to know at what period of time knowledge of this bulk sale was brought home to Mr. Olney, or to these complainants.

While there is no evidence in the record of this case as to when the incorporated camplainants first learned of the sale in bulk to Mr. Isaacs, the record does show that Mr. Main knew of this sale at the time of its happening, and Mr. Main, it will be recalled, was the agent of the complainants for this transaction, and in fact the only person representing complainants with whom Mr. Isaacs dealt. It follows, therefore, by reason of the general principles of agency, that this knowledge must be imputed to these complainants as of that time, namely September, 1913. Can it be said with these facts in view that complaint of this sale first made on January 31, 1917. entitles these complainants to recover in a court of equity? This point will be discussed at length hereafter.

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**IN EQUITY CASE NO. 83, HARRY C. SEYNEI, PLAINTIFF, v. DAVID ISAACS, DEFENDANT, THE SAME COUNSEL FOR APPELLANT, HERE (MR. OLNEY) ASSISTED BY MR. BAILEY, AN ATTORNEY AND A WITNESS IN THIS CASE, PROCURED A DECISION ESTABLISHING THAT THE BULK SALE WAS VALID, AND THAT SEYNEI, HIS CHIEF WITNESS HERE, WAS ENTITLED TO ONE-HALF INTEREST THEREIN.**

Inasmuch as the decision of the District Court of the United States in equity case No. 83, Harry C.

Seynei v. David Isaacs, has been repeatedly referred to by counsel for appellants (p. 138 appel. brief), we wish to call the court's attention to the bill of complaint filed in that case. Harry Seynei, as disclosed by the evidence, was a clerk in the employ of Mr. Bridge, the insolvent debtor and the insured. When Isaacs conceived the idea of purchasing the stock of goods he informed Mr. Main that he would engage Seynei, who was familiar with the trade; and later, in connection with the bulk sale, he informed Main that he, Isaacs, would bid on this stock himself *in the name of some other person* (Trans. p. 144). The business was thereafter conducted in the name of Seynei, so as to attract the trade with whom he was acquainted. Seynei did not invest one dollar in the enterprise. Subsequently differences arose between Seynei and Isaacs, and on June 4, 1914, Seynei filed a bill of complaint against Isaacs through Jesse Olney, his counsel and counsel for appellants in this case, in which former case he complained:

> "That upon and from November 17th to said November 21, 1913, at Seattle, Washington, complainant and defendant engaged together in taking of an inventory of their mutual stock of goods of the said H. C. Seynei & Co. That they mutually inventoried said stock of goods at cost price in the sum of $16,633.57.
>
> That thereupon the defendant caused the said stock of goods of H. C. Seynei & Co. in its entirety to be transported to San Francisco, in the State of California, to be disposed of by him there for the benefit of the said business of H. C. Seynei & Co., said copartnership. That

> since that date defendant has been engaged in the City of San Francisco, California, in the Northern District of California, in the sale of said stock of goods for the account of said firm and as trustee and agent of the complainant therein."

This bill of complaint closes with the prayer:

> "That the defendant David Isaacs may be decreed to be the trustee and agent of this plaintiff for and on account of the stock of goods and merchandise transported by him to San Francisco, Cal., and of all moneys received by him and bills receivable of H. C. Seynei & Co., heretofore above mentioned, from the beginning of said copartnership."

This places Counsel Jesse Olney in the inconsistent and inequitable position of seeking, in the first action, to have Seynei declared half-owner of the stock on the theory that the bulk sale was *proper and valid,* and, in this action, attempting to convince the court that the *same sale* was utterly *void and fraudulent.* That this was the theory upon which Mr. Olney invoked the aid of equity in the first case is evident from the form of the interlocutory decree in that case, in which that court found and declared as part of such decree:

> "That a partnership was formed on or before the 10th day of September, 1913, between the parties in this cause as partners for an equal interest in the partnership, *as stated in the bill of complaint,* which partnership has continued to the present time without change * * *"

Reference has already been made to the complaint which discloses the inconsistency above pointed out.

After the decision in that case Counsellor Jesse Olney, on January 31, 1917, in this case charges under oath (Trans. pp. 26-27):

> "That said transfer (referring to the bulk sale) to himself by their trustee was a gross fraud and imposition upon your complainants, who ask that said transfer be set aside and that their said trustee be charged with the full value of said trust fund, together with his profits thereon additional in such sum as the court shall find due upon the accounting herein prayed, together with legal interest thereon from time of said sale."
>
> (Signed) "Jesse Olney,
> Solicitor and Counsel for
> Complainants."

In other words, when counsel appeared for Seynei he claimed Seynei owned a half interest in the goods; when he appears for complainants in this suit, of his own knowledge he states that those same goods belong to these complainants. Counsel for appellant placed the opinion in that case in the record here clearly for the purpose of prejudicing the court against Isaacs. It was produced before Judge Rudkin, but it failed to move him. Counsel for this defendant were not interested in that case, and we shall not discuss its merits or demerits. Should not, however, the decree and its satisfaction in that case prove the undoing of counsel for the appellant in this case?

Waiving for the moment counsel's position, what kind of accounting shall Mr. Isaacs be called upon to render? Decision in the first case was procured through the same counsel who appeared here establishing an ownership of the merchandise in question in Seynei and Isaacs; now he asks this court of equity in this suit that that decision be ignored, and that a new decree be rendered holding that these complainants are the owners. Will Mr. Seynei, his former client and *the main witness in this case,* account, and will counsel account? Will Mr. Isaacs who, by force of that decision, accounted to Seynei on the basis that the bulk sale was proper and valid, be forced to now account again to these complainants to his own loss on the basis that the bulk sale was fraudulent and void? Must he pay over twice? What is the status of this sale? What is Mr. Olney's position? Where is the equity of the case? Will Mr. Olney be permitted to manipulate the strings and juggle with the situation so that from one simple transaction in which these complainants had less that $2000 invested, Counsellor Olney may in different equity courts stir up litigation involving nearly one hundred times that amount?

While this transaction is not referred to in Judge Rudkin's opinion, similar transactions are referred to in this remarkable suit (Trans. p. 38):

> "The claim made by these plaintiffs is somewhat extravagant, to say the least. Their printed brief opens with the statement:
>
> 'This is a case in equity, against the trustee by his *cestui que trust* for an account-

> ing of a *sixty thousand* dollar trust fund in his hands, consisting of merchandise which has all been sold and disposed of by the trustee.'
>
> The *unusual claim* on the part of the plaintiffs that they profited upwards of $25,000 by this fire, finds some support in the testimony of Bridge, Seynei, Jeremy, and perhaps others. Bridge has an action pending in the courts of the State of Washington against his assignee to recover damages in the sum of *$100,000* for sacrificing his property."

Bear in mind that these complainants are corporations—inanimate creations of the law, that it necessarily follows that by their knowledge is meant the knowledge of some agent representing them. Bear in mind that it is undisputed that Mr. Main was the agent of these complainant corporations. Bear in mind that as such agent, he alone represented these complainants in their dealings with Isaacs, and that Isaacs looked to him (Main) alone for his authority to act and as the sole person to whom he should and did communicate his activities. Bear in mind that *Main's good faith is not questioned,* that therefore his acts and knowledge are those of these complainants. Bear in mind that Main was completely apprised of all acts done by Isaacs including all details of this bulk sale. With these things in mind, can we escape the conclusion that this knowledge bound complainants and that they therefore are to be held to the knowledge of the bulk sale and by virtue of acquiescence therein for more than three years are bound thereby, and cannot now complain!

Overlook, if you will, the fact that, admitting they only learned of the bulk sale on February 13. 1916, complainants made no mention of it either in their original bill of complaint, filed February 23, 1916, nor in their amended bill of complaint, filed May 4, 1916.

But you cannot overlook the conclusion to be drawn from this chain of facts: that the bulk sale is first made an issue in this case by an amendment to the amended bill of complaint filed January 31, *1917,* verified by Jesse Olney, counsel for complainants, because "the allegations of said amendment are more within my own knowledge than of the officers of the said corporations complainant"; that Jesse Olney was counsel for Seynei in a suit by him against Mr. Isaacs filed June 4, 1914, and that that suit was based on the bulk sale of the stock in question, *full information and knowledge of which sale counsellor Jesse Olney therefore must have had at that time, June 4, 1914.*

Have these complainants, therefore, any standing in a court of equity on the issue of the bulk sale by reason of the filing of an amendment to their bill of complaint on January 31, *1917,* verified by their counsel, Jesse Olney, because "of my own knowledge" of the matters herein alleged?

Should the court not coincide with counsel's view that this one point alone justifies this petition and, in fact, an affirmance of the court below, we beg the indulgence of the court in presenting the remaining points in this petition.

There are two points which, as preliminary propositions, we desire to call to the court's attention.

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### THIS PETITION IS BY THE APPELLEE.

First, that this petition is by the appellee, not by an appellant,—the judgment of the lower court having, on appeal, been reversed. It is our belief that this court is more prone, in deference perhaps to the court below, with whose opinion the reversal shows it to have differed, to entertain and grant such a petition under these circumstances, than it might perhaps be where judgment on appeal were affirmed and a petition for rehearing filed by appellant. The tendency to extend greater latitude in those cases where appellee petitions for rehearing may also partially rest on this basis: that whereas appeal is the opportunity given appellant to relieve himself from judgment against him in the court below,—should he be successful in having such judgment reversed petition for rehearing is the opportunity given appellee to relieve himself from such judgment against him by the appellate court.

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### REVERSAL WAS ON FACTS, NOT LAW.

Second, that the decision of the appellate court reversing judgment of the court below, is grounded —not upon impregnable legal axioms which no number of rehearings could affect or change—but

upon certain *facts* of the case as disclosed by the testimony, to which testimony the appellate court affixed a different interpretation and significance than did the court below. We believe that this is a distinction of importance and that it is one favoring the granting of this petition for rehearing, for these reasons:

With all due deference to the appellate court, we submit that the trial court was in a far better situation than was the appellate court to judge as to the importance and the significance of the testimony. It had many of the witnesses before it. It could observe the demeanor and general appearance of each person testifying, and it is to be presumed that it coupled with the testimony given the manner in which that testimony was delivered, and judged accordingly.

Announcing a well known rule of law often recognized by this court, in Meers & Dayton v. Childers, 228 Fed. 640, the court said:

> "We (the Circuit Court of Appeals) cannot * * * pass upon the credibility of any of the witnesses. The demeanor of witnesses necessarily has much to do with the question of their credibility."

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### MR. BAILEY'S TESTIMONY.

That the trial court did not attach the same significance to the testimony of Bailey, as did the appellate court may well have been for reasons which did not, and necessarily by their very nature,

could not appear on the written record. While it may be true, as decided by the appellate court, that this testimony "bears upon its face every indication of truthfulness", it does not follow that the court below did not see other indications sufficient to justify that court in discounting the face value of the testimony. While this is not the place, nor is it the desire of counsel, to impeach Mr. Bailey as a witness, as an example of what we above set forth we beg to submit the following points regarding his testimony:

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BAILEY DISCOUNTED BY APPELLANT.

It is a most significant commentary on the importance attached to Bailey's testimony at the trial, that counsel for appellant do little more than make casual reference to it in a brief of two hundred and seventy-three pages dealing in extenso with every possible point and argument from every conceivable angle and quoting fully any testimony deemed by counsel as useful in bolstering up appellant's case. With this in mind we note the brevity of the only reference to Bailey's testimony on the question of the bulk sale (Appellant's Brief, pp. 160-1):

> "Mr. Bailey's testimony was that he was in the store at the time of the sale that Monday morning and heard two men complaining because they had not been given time to examine the stock, as they would like to have bid. He saw no bids. The time was too short for any prospective bidders to examine the stock.

'Mr. Seynei told me he had got the stock but that he knew he would all the time. I knew Mr. Seynei expected to get the goods but I did not know how they were going to do it. I remarked that it would be a pretty good joke if someone else had come in at that moment, when they had agreed upon their partnership, and bid in the goods, that is put in a bid over Seynei; and Seynei laughed and said that could not very well happen. Mr. Isaacs knew what to bid and gave it to him to put it.'"

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BAILEY'S INTEREST.

We call attention to this further testimony of Mr. Bailey (Trans. p. 103):

> "I know Mr. Jesse Olney (counsel for appellant). I have had nothing *lately* in which *he was interested except* the case of H. C. Seynei versus the defendant in this case, that I know of. That action was prosecuted by *me* against the defendant on behalf of Mr. Seynei * * *."

We urge that this was a very important *exception.* A further tendency to speak unfavorably to this defendant may be evinced from this testimony of Bailey (Trans. p. 106):

> "I went to the store probably three or four times a week during the sale; *that was purely out of my friendship for Mr. Seynei* * * *."

One cannot help but note in passing that it is at least most singular and unusual that Attorney Bailey should "purely out of my friendship for Mr. Seynei" consume so much of his valuable time wandering around the premises of this fire sale

so frequently. Surely this does not profit an attorney, unless the subsequent handling of litigation is obtained thereby.

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BAILEY'S RELUCTANCE.

The record discloses further the following rather unwilling admissions which, while not as clear and forceful as is that part of Bailey's testimony directed *against* the interests of this defendant, is nevertheless pregnant with meaning (Trans. p. 102, 108):

> "* * * I went down at that hour and was there when the bids (note, not *bid*) were opened * * * I do not know whether there were other bids submitted for the goods. I *think* there was one or two others. I don't know that there was any competitive bidding but *I think so.*"

Throughout his testimony, Bailey testified in the most certain of terms as to matters which the court and even counsel for appellants were doubtful about, when such matters were adverse to this defendant. Is it not significant, therefore, that regarding this one matter of competitive bids as to which his knowledge is in *favor* of this defendant, Bailey forsakes his positive attitude of "I know" and substitutes "I think"?

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BAILEY'S WEAKNESS.

Furthermore, a close analysis of the testimony itself tending to show the absence of competitive

bids will, we believe, disclose its own weakness. In this connection it is our contention that the closing of the bids before 3 P. M., the time stated in the advertisement, was material in this case only if it was shown that these complainants were injured thereby, and that a *possible* injury which *might* have resulted to complainants from the exclusion of a possible bidder who *might* have appeared if the bids were not closed so soon, and who *might* have made a bid which bid *might* have been in excess of the one presented by Seynei, is too remote to be considered. The testimony of Bailey is the only indication of any injury less remote than that immediately heretofore referred to. That testimony is as follows (Trans. p. 102):

> "Two men whom I did not know were complaining to Mr. Seynei that they would like to have bid had they time to examine the goods before the bids were opened, but could not do it."

As the strongest, in fact the only, evidence as to the most vital point in the case, this single sentence by a witness who unqualifiedly and positively and fully testified *against* the defendant as to all other matters, is a rather weak point on which to hang the argument that the bulk sale was fraudulent. Had there been anything else that the witness could have said in this regard, we are assured that counsel for appellants would have elicited the information.

In addition to its brevity, the following observations point to the worthlessness of this testimony as

showing lack of competition. It does not appear who these two men were; in fact Bailey, said to be a practicing attorney in Seattle, and said to be well acquainted with the merchants. "did not know" them. It does not appear that they made a bid, were in a position to make one, or if they had made one that it would have been in excess of the bid made by Seynei. It does not appear that they asked for an opportunity to make such a bid. It does not appear that they made any effort to examine the stock or to make a bid, but merely stood idly and loosely talking to Seynei. It does not appear, and this point is most significant, that it was too late for them to make a bid or that they would not have been allowed to do so had they really desired. From these propositions it follows that complainants were not injured by reason of the bids having been opened at 11 A. M., instead of at 3 P. M.

We earnestly apologize for consuming so much time in considering Mr. Bailey's testimony, but we believe this course is justified in view of the importance attached to this testimony by the appellate court.

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### MR. ISAACS' TESTIMONY.

At this time we call to the court's attention the fact that Mr. Isaacs' testimony was given in open court and that he was subjected to a rigid cross-examination. He produced the original slips of sale gotten up by 30 or 40 clerks at the time of the

transactions. He explained in detail the matter of the bulk sale to himself and testified that this sale to him was with the sanction and concurrence of complainants' agent,—Main. Mr. Main still remained in the employ of complainants as late as at the time of trial where his testimony corroborated in every detail the testimony of Mr. Isaacs; and let it be borne in mind that he (Main) had full knowledge of the transaction from its inception to its conclusion.

Let us also remind the court that Lester Herrick, an accountant of recognized standing in his profession, the man who was auditor in chief of the Panama Pacific International Exposition, testified that while Mr. Isaacs' accounting was crude it bore all evidence of honest intent and integrity; that he also explained that in the matter of a fire sale, a hurry up proposition, a scientific book-keeping would not be followed.

We find Isaacs accounting in open court in all matters occurring prior to the sale in bulk. He had accounted before by his statement of 1913, but he again accounted in open court at the time of trial. We do not understand that this accounting is questioned by this honorable court in its opinion. But if Isaacs is to be believed in the matter of the retail accounting what reason is there for this court to reject any part of his testimony?

Judge Rudkin believed Mr. Isaacs' version. Indeed, Isaacs was corroborated by the only witness who knew the facts,—agent Main. Attacking the

bulk sale, as we have shown, was clearly an after thought. The original complaint makes no mention of it. It is not mentioned until three years after the sale took place. The original complaint merely charged that he padded the expense account in the matter of rent, clerk hire, etc., and that his totals were false. These charges were shown to be absolutely unfounded, and then came the other attack. This latter attack, is, we believe, equally without merit.

It is perhaps not irrelevant to inquire whether the fact that the prior case of Seynei v. Isaacs, conducted by counsellor Olney on behalf of Mr. Seynei, was predicated upon the theory that this bulk sale was proper and valid, accounts for the circumstances that this bulk sale was not attacked as fraudulent and void until January 31, 1917. Here we have two inconsistent adjudications, both obtained at the behest of counsel for appellants, one that the bulk sale was valid, in which he obtained a decision and a collection for several thousands of dollars, and the other that the same bulk sale was fraudulent and void. It suggests itself that this is the reason why the attack on the bulk sale was not made until the late date of January 31, 1917. Is this such a reason as appeals to a court of equity as accounting for the delay in setting up an alleged fraud after three years knowledge and acquiescence?

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### MR. ISAACS CORROBORATED BY J. R. MASON.

J. R. Mason was a witness for complainants and was employed by Bridge's assignee to adjudge

Bridge's loss after the fire. He testified on cross-examination:

> "I considered 45% a reasonable price for the remnants of that sale, if they were the average remnants, such as would follow a retail sale, all broken lines or badly damaged goods such as naturally would be left by buyers * * *." (Trans. p. 115)

(Note: Mr. Isaacs paid 45%.)

> "Where a sale breaks down to a point where the cost is 50% to do business it would be advisable to hurry a sale in bulk through as quickly as possible. Any notice that would be sufficient to assemble a requisite number of responsible buyers and competitive bidders would be fair, and I would say that such sale was conducted under such circumstances as made it probable that as much had been realized as might have been if there had been a more extended advertisement in the newspaper." (Trans. p. 116)

On re-direct examination Mr. Mason testified:

> "* * * If the balance of the stock sold in bulk was more than half the stock it could not all be remnants; of course the lines are broken. *I considered $11,000 a fair valuation of a stock the other half of which sold at retail for $17,-800.*" (Trans. p. 116)

(Note: Mr. Isaacs paid $11,094 for the bulk stock.)

(That the retail sale was not fraudulent is shown by the fact that sale slips were produced by from thirty to forty clerks, and a conspiracy between all of these clerks would have been necessary in order

to have carried out such a fraudulent scheme. These sale slips were examined in open court by Accountant George T. Klink, for the complainants, and by Accountant Lester Herrick for the defendant, and found to bear no ear marks of fraud.)

Mason, continuing, testified:

> "An advertisement in a newspaper does not reach the Portland and San Francisco buyers; local buyers know all about it anyway. Where a stock is turned over to a salvage man for sale, either under a guarantee or commission, my experience is that the expectations of the Insurance Company are very disappointing." (Trans. p. 117)

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#### MR. ISAACS CORROBORATED BY GEORGE C. MAIN.

George C. Main, called for complainants, further corroborated Mr. Isaacs as follows:

> "I did not consider there was an opportunity to obtain more than defendants guarantee and expenses. I was free to drive a better bargain if I thought I could make one. In my opinion it was a fair proposition. * * * A salvage man does not always make a profit above his guarantee and I have known where a deficit was reported." (Trans. p. 119)

> "* * * He (Mr. Isaacs) made his final report to the complainants through me in the latter part of November, 1913." (Trans. p. 120)

> "After his statement was received I saw him numerous times but never signified any desire for a more detailed account of the receipts and disbursements in connection with the retail sale. * * * (Trans, p. 120) I told him, however, that if it were put up at sealed

bids it could go at a very low figure. * * * He said substantially that he would see that we were protected on that proposition; that he would put in a bid in his own behalf at a figure which he thought would represent the fair value of the assets as they then stood and that if any other bid came along that was higher than his the other party was welcome to it, because it would mean that the stock would bring all it was worth. There was nothing in this plan as he outlined it to me that I thought was objectionable. I understood after the sale in bulk what he paid for it. I knew because I knew the amount of the inventory and his bid was something about $11,000, which was 40 or 45% of the invoice, the original invoice price of the goods. I thought at the time it was a very good bid. Looking at it now it seems we might have done better." (Trans. p. 121)

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MR. ISAACS CORROBORATED BY LESTER HERRICK.

Lester Herrick testified, with reference to the retail sale, that:

"These slips bear serial numbers but not one complete series; they bear the numbers appearing in the various books. These sale slips appear, so far as I could determine, to have been made in the due and regular course of business. They do not bear any evidence or ear marks or changes, obliterations or alterations to any extent that would cause any suspicion." (Trans. p. 132)

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MR. ISAACS CORROBORATED BY J. O. JOHNSON.

J. O. Johnson, a witness called for the complainants, corroborated Mr. Isaacs. Mr. Johnson was a salesman. He testified that

"After the sale had stopped the sizes were pretty well broken, all sold down. All the clothing was exposed to sale." (Trans. p. 88)

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MR. ISAACS CORROBORATED BY WILLIAM J. MEYER.

William J. Meyer, another salesman, called by the complainants, corroborated Mr. Isaacs. He testified in part as follows:

"I said it was a successful sale because lots of people came in and went out, having made purchases. I have known of sales where great crowds of people have come to purchase and yet it was perhaps a loss in the end. Not having the figures I cannot state whether or not the sale was a success. After the fire sale had stopped and before the place was opened up under the name of Seynei, new goods came into the store and improved the stock." (Trans. p. 91)

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MR. ISAACS CORROBORATED BY THE FACTS.

That Mr. Isaacs acted in all good faith as to the bulk sale is further evidenced by the testimony showing that there was a genuine competitive sale; that it was advertised; that Mr. Bailey knew about it; that Mr. Isaacs made no secret about it, and that genuine bids were put in by others.

Wasserman & Schermer bid 25%.

Colsky bid $4200.

Cone bid between 25% and 30%.

Kessler's bid was 30%.

Buttnick bid between 25% and 30%.

Brenner Bros. of Bellingham, Washington, made an offer of $10,000 conditioned that they could get the premises for continuing the sale (Trans. p. 144).

This last bid could not be considered, of course, by reason of the condition attached thereto. However, even were it accepted and the goods sold to this bidder, these complainants would have received only $8000 net, Mr. Isaacs being clearly entitled to his 20% commission on this sale. By the sale to himself, Isaacs secured for complainants an additional $875.

With the amounts of the above bids in mind, it will be recalled that in authorizing the sale on behalf of complainants, agent Main stated that he did not believe that more than 30% would be offered. Surely there cannot now be a complaint that Mr. Isaacs offered and paid 45%.

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COMPLAINANTS' WITNESSES VITALLY INTERESTED.

In viewing the testimony of Mr. Bridge it should be borne in mind that he was the original owner and storekeeper, that he had lost his standing and his credit, and it must have galled him to see a third party engaged in the sale of his former stock. It will be recalled that he was forced to make an assignment for the benefit of his creditors and his mental state may well be judged by the fact that he had started suit for $100,000 against his assignee.

Harry Seynei was more than usually embittered against Mr. Isaacs and his hostile attitude and desire to prejudice this defendant are most apparent from his testimony, all of which are elements vitally necessary to be considered. This erstwhile small-salaried sales-clerk who had been employed by Isaacs, given work and remuneration therefor, placed in a responsible position and given charge of the sale of this stock, and later, without an investment by him (Seynei) of a single dollar, given an interest in Mr. Isaacs' business,—in gracious return for these bounties conferred upon him by Mr. Isaacs, falls out with him and sued him for several thousands of dollars and at the trial of this case gives testimony of such color and in such an attitude that His Honor, Judge Rudkin very properly said (Tr. p. 38):

> "Seynei, according to his testimony, conspired with the defendants to defraud the plaintiff, and later quarreled with his partner in iniquity over the spoils. * * * These witnesses testified that the damage caused by the fire was only nominal, and that the fire in fact added 25% to the value of the stock. *Such claim and such testimony do not appeal to me very strongly.*"

Mr. Bailey's interest we have in an earlier part of this petition fully considered. Suffice here to note that by reason of his employment as attorney for Mr. Seynei and his association with Mr. Olney in the case of Seynei v. Isaacs, Mr. Bailey is vitally interested in the losses and gains of Mr. Seynei.

I shall not again refer to the testimony of Mr. Isaacs, but I shall ask the court if it will please again examine it in the light of the presumption of innocence (Trans. pp. 142-160).

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### LEGAL PRINCIPLES INVOLVED.

For the purpose of this petition, we assume the following five propositions to be true and incontestably established:

(1) Main was the general agent of these complainants, for this transaction.

(2) His acts bound complainants.

(3) His knowledge is imputed to complainants.

(4) A sale by the trustee to himself of the trust property, is not ipso facto void.

(5) Such a sale is binding on the principles if they, having knowledge of all material facts regarding thereto, acquiesce therein, and is not thereafter voidable on the ground of a subsequent discovery by them of facts which would not have altered their acquiescence had they known of such facts at the time.

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### THE APPELLATE COURT'S DECISION.

Turning now to the decision of the appellate court, we find that it leaves uncontradicted everything established by the judgment of the court be-

low, save and excepting as to the sale in bulk. On this question the appellate court's finding reverses the court below and holds the bulk sale to be grossly fraudulent and void. Analysis of the decision shows that the court based its opinion that there was fraud on the following six propositions of fact:

(1) That Isaacs represented that the sales decreased from day to day running down as low as $400 to $500 a day, the average daily expenses being over $200.

(2) That Isaacs sold the stock in bulk at 11 A. M. instead of waiting until 3 P. M. in accordance with the advertisement of the sale.

(3) That he sold the property for 2% less than his own written bid and deducted 20% before paying the balance to complainants.

(4) That he made a written list admitting the value of this property to be $24,603.39.

(5) That his testimony as to there being competing bids is refuted by five of his clerks and by Bailey.

(6) That he put the advertisement of the sale under a fictitious name and for one day only.

We believe these six propositions with the conclusion drawn therefrom that the bulk sale was fraudulent and void, and a statement of the facts of the case, constitute the entire opinion of the

appellate court. It will readily be seen that there is no contravention of any of the legal principles advanced on behalf of defendant and sustained by the court below. The judgment of that court was reversed on the sole ground that the appellate court deemed that these six admittedly true statements of fact constituted fraud, whereas these same facts as viewed and interpreted by the court below were held by it not to constitute fraud. Where a reversal is thus had by reason of the appellate court interpreting facts differently than did the trial court and adversely to appellee, it may well be that such action is at least partially the result of counsel's for the appellee inability to point out to the appellate court the propositions and circumstances upon which the court below rested its opinion. Wherefore, we earnestly request the granting of this petition so that counsel, now by reason of the decision, acquainted with the appellate court's view in the premises, may have an opportunity of presenting their views supporting the lower court's interpretation of these facts.

We urge the following in support of our interpretation of each of the above six propositions, and for the purpose of clarity herewith present each one separately:

**(1) That Isaacs Represented that the Sales Decreased From Day to Day, Running Down as low as $400 to $500 a Day, the Average Daily Expenses Being Over $200.**

A review of the evidence shows that, far from any of these statements being fraudulent or mis-

carrying, to the contrary each portion is supported by competent testimony. Clear proof of the decrease of business is furnished by the fact that the force of clerks was reduced from 35 to 15 (Trans. p. 51; testimony of H. C. Seynei):

> "The first day of that insurance sale there were 30 or 35 clerks employed. Toward the end of the sale these were reduced to about 15 in all."

Receipts for the third week of the sale were $300 less than the preceding week, but the most vital indication of all was the drop in the sale on Saturday, September 27. The sale on Saturday was a splendid indication by which to judge the balance of the week, and if, as Mr. Isaacs, experienced as to these various matters, was justified in predicting, the drop in the week corresponded to the drop on Saturday, which was a forty per cent decrease on sales, a continuing of the sale even one day more would have been at a large loss to these complainants. It must be borne in mind that a fire sale is at most a transient affair. It soon loses its glamor and appeal for the public, its strongest appeal resulting from its being conducted immediately after the conflagration. When that event recedes into the past, the sale loses its potency, and some new item of interest must be added, which was here done, namely, the transfer of the stock to Seynei, the adding of new stock and the commencement of a new enterprise, as to all of which these complainants would not be interested, their business being insurance, not merchandise.

What Mr. Isaacs said as to the expenses was mathematically correct. The total expenses for nineteen days were $27,852.11. From this amount are to be subtracted $5,780.38 for commissions, and $18,100 advanced as guarantee, which leaves a total running expense for nineteen days of $3,-971.73, or a daily running expense of $209.

**(2) That Mr. Isaacs Sold the Stock in Bulk at 11 A. M., Instead of Waiting Until 3 P. M. in Accordance With the Advertisement of Sale.**

There can be no dispute that by the fraud referred to by the court is meant fraud practiced against these complainants by this defendant. It follows, therefore, that the above stated fact, (2) is not such an element of fraud as will avoid this sale unless the complainants were injured by this act of the defendant. For reasons stated at length in the early part of this petition, there was no injury to complainants, except, possibly, some conjectural injury predicated upon all sorts of contingencies too remote to be here considered.

**(3) That He Sold the Property for 2% Less Than His Own Written Bid and Deducted 20% Before Paying the Balance to Complainants.**

The 2% difference now becomes immaterial, in view of the fact that there was not a formal sale with strict terms as to sealed bids, that this bid was by himself, that he was under no obligation to complainants to be bound by any bids, and that his 45c bid was far in excess of any offer made by

others, and further that the 47c bid was merely placed as a formality in protection of complainants, as stated by Mr. Isaacs to Mr. Main.

As to the deduction of the 20% commission, this Mr. Isaacs was justly entitled to by the terms of his agreement with the complainants. Had the bulk sale been made to a third person for, say, $10,000, it could not be disputed that Mr. Isaacs would have been entitled to $2000 commission. That he was himself the purchaser cannot change the fact that he was entitled to a 20% commission on any sale made.

**(4) That He Made a Written List Admitting the Value of This Property to be $24,603.39.**

While the court does not state its purpose in alluding to this point, it is intimated that this looks to the gross inadequacy of consideration. It is not a proper basis, however, of determining the value of second hand stock to look either to the original cost price nor to the proceeds of any subsequent retail sale of such stock. It must be borne in mind that these complainants are insurance companies, and are not engaged in a mercantile undertaking for profit as that is ordinarily understood, but seek only to recover their loss. Were they offered a mercantile stock inventoried at $24,603.39 for which they would have to pay $8876, conduct a seven weeks' retail sale, invest an additional $6000 in new stock to supplement the other, close the sale, box the goods remaining, ship them to San Francisco,

and conduct a sale of it there, obtain someone to manage said business and clerks to carry on the sale, assume all the expenses incurred in these transactions, and risk the chances and losses involved,—we are prepared to say unqualifiedly that they would reject such a proposition. This is what Mr. Isaacs did. In view thereof it can not be said that he acted fraudulently or paid an inadequate amount when he relieved complainants from such a situation by buying this bulk stock and paying therefor $8876 net to complainants.

**(5) That His Testimony as to there Being Competing Bids Is Refuted by His Clerks and by Mr. Bailey.**

Mr. Bailey's testimony has been fully dealt with heretofore. As to the clerks, it does not appear that any of them were in a position to know whether there were any bids or not. They testified merely that they saw none,—not that there were none.

**(6) That He Put the Advertisement of the Sale Under a Fictitious Name, and for one Day Only.**

It cannot be seriously claimed by reason of the fact that this advertisement was placed under the name of Coast Fire and Marine Insurance Co., D. Isaacs, manager, that any injury was thereby incurred by complainants, or any fraud practiced on them by this defendant. Nor does it appear that any injury resulted to complainants by reason of the advertisement being placed for one day only. The only testimony in the case as to the probable result of such sale is that of these complainants'

agent, Main, who gave it as his opinion that the sale would bring only 30% at the highest, *and with this belief he authorized the sale on behalf of complainants.* As Mr. Isaacs' bid far exceeded this amount, complainants cannot be heard to say that they were injured thereby, even had there been no advertisement of the sale. In this connection we note Mr. Main's testimony (Trans. p. 122):

> "*Ordinarily* one day's notice of a sale is not customary and seems to me short and would tend to cut out competition *if the bidders had not been notified in advance. There are several buyers right here where considerable competition is quickly obtained in the sale of large stocks of merchandise and ready on short notice to examine a stock, figure on and bid for it.* I have heard that Colsky, Buttnick & Westerman and Schermer put in bids. I thought at the time *such notice was fair to complainants and sufficient, and I have not changed my opinion on that.*"

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COMPLAINANTS' KNOWLEDGE AND ACQUIESCENCE.

Moreover, it must be recalled (and this single fact alone, we believe, concludes complainants from ever complaining) these complainants, through Mr. Main, their agent, *after* having complete information as to each of the above six propositions, agreed to the sale, ratified the action taken by Mr. Isaacs, accepted his report, and retained the money paid to them by him, making no objection or protest of any kind until the time of the commencement of this action.

### MAIN'S ACTS BOUND COMPLAINANTS.

In this connection it must be borne in mind (and we here mention and amphasize this point only because of the unwarranted inuendos contained in appellants' brief insinuating to the contrary) that there is no evidence to sustain the charge that Mr. Main was colluding with Mr. Isaacs, or that he acted in any way other than strictly in conformity with that ultra good faith and fidelity demanded of an agent in order that his acts and his knowledge may bind his principals; and it is therefore to be conceded without argument that Mr. Main did so conduct himself, and that, therefore, his principals, these complainants, were bound by his acts and his knowledge. That these complainants were thoroughly satisfied with Mr. Main's work for them, and remained so satisfied even at the time this action was commenced, is evidenced by the undisputed testimony of Mr. Main that

> "I have been an adjuster for twenty-five years, and have done a great deal of adjusting for the complainants *and am still doing work for them.*" (Trans. p. 122)

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### THE AMOUNT INVOLVED.

At this point, we respectfully call the court's attention to the equity of the case as it presents itself to counsel.

The original cost price of the entire stock as it stood immediately before the fire, as per the Bridge

inventory conceded by all to be correct, was $45,000. *The actual value* of this stock may well be judged from the fact that Bridge's assignee, the vice-president of the First National Bank of Seattle, parted with it for *$18,000,* this being the amount claimed by him as above the loss sustained by the fire. He has been sued for $100,000 damages by Mr. Bridge. That $18,000 was not an undervaluation is evidenced by the fact that the complainants here only consented to pay this amount with great reluctance, after lengthy and disputed negotiations, and after they had received Isaacs' guarantee of $18,000 which thus protected them within $2000 of the $14,000 they were willing to pay Bridge in order to satisfy their liability to him under his insurance policies without having anything to do with the stock.

This means that their investment in the entire transaction was less than $2000 of which amount they in fact realized over half. In return for the small loss they sustained over and above what they were originally willing to pay Bridge, they received in return (1) an end of the disputes and negotiations with Bridge, (2) cancellation of their liability under their policies, and (3) avoidance of litigation with a possibility of their having to pay the $16,200 finally claimed by Bridge as his loss, which was an amount greater by $1,049 than the net amount they had to pay by reason of their dealings with Mr. Isaacs.

In other words, had these complainants not dealt with Mr. Isaacs, and Mr. Bridge or his assignee

established his right to the amount claimed as loss, these complainants would have lost an additional $1,049 plus the expenses of the negotiations and the costs of litigation. Through the work of Mr. Isaacs they avoided this loss, and that they were entirely satisfied is conclusively established by their acquiescence in the transaction for such a long period of time.

Mr. Isaacs' investment, on the other hand, was $18,000, the whole or any part of which he risked a chance of losing. He had no guarantee that the sale would bring this amount, nor that someone else in the city might not have another fire-sale and ruin his opportunity for profit, nor that any contingency might not arise and prevent his making the sale a success. Mr. Main, an experienced insurance adjuster, testified on this point (Trans. p. 119):

> "A salvage man does not always make a profit above his guarantee and I have known where a deficit was reported."

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### REVERSAL ON APPEAL.

We respectfully urge that the decision of the appellate court is not merely a departure from the well settled rule that where the evidence in the court below is conflicting as to a particular fact, the appellate court will not disturb a finding based on such evidence in the absence of gross error, but that it sets a precedent for a dangerous doctrine by which in future cases appellate court deci-

sions may overturn findings of fact made on the basis of materially conflicting evidence by the court below. Furthermore, does it not make of the appellate court a trial court if this court may say that one witness shall be believed and not another?

We beg leave to set before this court the following authorities:

In the case of Thorndyke v. Alaska Perseverance Mining Co., 164 Fed. 657, it is said:

> "Whatever conflict there is in the evidence was resolved against the plaintiff by the judge of the court below whose findings are in cases like the present always to be taken as presumptively correct and unless an obvious error has intervened in the application of the law or some serious or important mistake has been made in the consideration of the evidence the findings should not be disturbed."

And to the same effect is Wilson v. Sands et al., 231 Fed. 921, a bill in equity to rescind a contract of settlement on the ground of misrepresentation and fraud.

To the same effect is the case of De Laval Separator Co. v. Iowa Dairy Separator Co., 194 Fed. 423.

Of especial import is the decision in Tobey v. Kilbourne, 222 Fed. 760, to this effect:

> "The court below upon the evidence found that the appellees were not parties to the fraud. * * * It is the established rule that the findings of the trial court in a suit in equity must be taken as presumptively correct and that unless an obvious error has intervened in the

> application of the law or some serious or important mistake has been made in the consideration of the evidence the findings will not be disturbed by the appellate court. This rule is especially applicable in a case in which as here the testimony was taken in open court where the trial court had the opportunity to observe the demeanor of the witnesses and their manner of testifying and the appellate court has before it only a condensed printed statement of the evidence as it is presented under the new equity rule."

The reluctance of the appellate court to disturb the findings of the lower court is thus clearly shown. While it may be true as the appellant contends that one conclusion may be drawn from the facts in evidence, the fact that the court below drew the other conclusion from those facts will in the absence of gross error lead the appellate court to leave that finding undisturbed.

So in the instant case while it may be true that from the six sets of facts referred to by the appellate court that court might have deduced fraud had it been sitting at the trial of the case, the fact remains that these facts did not come before it in the first instance but that the trial court which did hear the testimony came to the conclusion from these facts that there was no fraud and made its finding accordingly.

Assuming the strongest possible position for the appellants, can it be said in view of the established rule set out in the above cited cases that there was such a serious mistake or error in the

consideration of the evidence by the court below as would justify the appellate court in reversing the finding of the lower court?

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**ACCOUNT STATED IN FIRE SALES REVIEWED IN McMANUS v. SAWYER, 231 FED. 231, BY JUDGE LEARNED HAND.**

This is an interesting case to which we invite the court's attention, especially as it demonstrates what a fire sale really is, and how difficult it is to render an accounting arising from such a sale.

As bearing on allowances for smoke damages, the court said:

> "The next exception of surcharge is to the items of the 20 pieces which were in the fourth loft, and which suffered a smoke damage, for which the plaintiff was allowed $180.97, 30 per cent of their value. * * * The plaintiff was credited with the sum which had been obtained from these, together with the allowance for depreciation, and no question can be raised about them."

This means that a 70 per cent depreciation for smoke damage was allowed.

That a party will be bound by his acceptance of an account sent him is pointed out by the court as follows:

> "From March, 1908, the parties had been in business together, and throughout all the time the 'accounts current' had been regularly sent, and there is no suggestion that they had been returned. On the contrary, the whole business had been done upon their basis without any complaint by the plaintiff. This estab-

lished the course of the business by mutual consent upon a footing which was entirely reasonable in itself. The credit is therefore allowed."

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THE STIGMA PLACED ON ISAACS.

We respectfully urge that the decision of the appellate court casts a stigma upon this defendant's name and brands him with actual fraud in connection with his business dealings as an insurance salvage man, and renders it impossible for him to continue to gain the confidence and respect which he has commanded in the past fifteen years of his business activity. While short of a criminal conviction, its blasting effect could never be effaced by Mr. David Isaacs, a man 60 years of age, a father and grandfather, and we sincerely urge that in the absence of clear and unmistakable proof of the fraudulent dealings charged to him this defendant should be purged of the shame that a reversal of facts would bring to him.

In this connection, we desire to call to this court's attention and to discuss somewhat in detail a case which forcibly illustrates the very extreme reluctancy with which this court will impute fraud to a person, a case in fact which shows the extreme length to which this court has gone in order to purge a defendant brought before it of the stigma of fraud, and a case with which counsel for this appellee is well acquainted by reason of his having represented the creditors (appellees) therein. The

case is Harvey v. Stowe, 219 Fed. 17. The suit was by the trustee in bankruptcy against the wife of the bankrupt, Harvey,—the main question in issue being whether a gift by the bankrupt to his wife was made at a time when he was insolvent and thus a fraud upon creditors and void. The United States District Court, after considering all the evidence, found that there was a fraud and the gift was declared void.

The Circuit Court of Appeals (Ninth Circuit), however, reversed this decree because it found that "a serious mistake had been made by the trial court"; and the following excerpts from the opinion will illustrate how repugnant it is to this court of equity to cast the stigma of fraud upon any of the parties before them and how broadly this court will construe evidence in order to remove that stigma of fraud.

> "Concededly it *is a strong circumstance* against Mr. and Mrs. Harvey's claim that Harvey should have carried this stock on his private books as if it were his own. * * * It is true that manifestly his books were not scientifically kept. * * * There are other entries in his books, however * * * which would seem to indicate that there might have been a mistake on his part * * *."

Despite this "strong circumstance against" the parties, this court in that suit found that there was no fraud. Surely Mr. Isaacs' books which were also "not scientifically kept" should not be any more strictly scanned especially in view of Mr. Herrick's

testimony that "it appears to have been the intent of the defendant to keep an honest record and I see nothing indicating the contrary."

The decision in the Harvey case then points to another indication of fraud which it decides was given too much importance by the lower court, and the appellate court proceeds to explain the situation so as to negative fraud:

> "Another thing which *seems to militate* against the accuracy of Mrs. Harvey's testimony is the fact that she first testified that she kept this stock in her safe deposit box * * *. But later she changed her testimony and affirmed that the stock was kept in her own private safe at her residence. *This was a matter about which she may have made a candid mistake.*
>
> "Again, the memorandum of Mrs. Harvey touching the time when she received the stock *seems to discredit* her."

Surely Mr. Isaacs' testimony which did not contain any such *"mistakes"* should be given equal credibility by an appellate court which did not view either witness, especially when it is considered that Isaacs' testimony is substantiated by other witnesses.

Turning again to the Harvey case, we find this in the opinion:

> " * * while the stock was carried on his private books as an asset of his own, we think it does not destroy the verity of his statement respecting the initial fact of endorsing and delivering the stock as a gift to her. We are

still bound to believe what *he* said as to that and what *his* wife said as to *it*.

"The further discrepancies in Mrs. Harvey's narrative which have been heretofore noticed are of no greater moment than often happens with perfectly truthful and candid witnesses."

Despite these suspicious circumstances, the court obviously took the same stand which we assume in this case and which we humbly ask this court to reassert here as it did in the Harvey case,—namely that in the absence of clear and unmistakable proof to the contrary it will not be found that any of the parties acted fraudulently or with intent to defraud.

Wherefore, with profound respect for the opinion of this court, but with regard alike for the welfare of this defendant and his family and for the ends of justice, counsel earnestly request a rehearing of this case.

Dated, San Francisco,
February 1, 1919.

LEON E. PRESCOTT,
BERT SCHLESINGER,
*Counsel for Appellee and Petitioner.*

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehear-

ing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
February 1, 1919.

BERT SCHLESINGER,
*Of Counsel for Appellee and Petitioner.*